

BEFORE THE IOWA PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
Factfinding between

CITY OF DAVENPORT, IOWA,
Employer

and

DAVENPORT ASSOCIATION OF
PROFESSIONAL FIREFIGHTERS
LOCAL NO. 17, AFL-CIO,
Union.

Marvin F. Hill, Jr.
Factfinder

Hearing date: February 26, 2002
Issue: Salaries

2002 MAR 25 AM 11:02
IOWA PUBLIC EMPLOYMENT
RELATIONS BOARD

APPEARANCES

For the Union: Gary K. Koos, Esq., Koos Law Offices, 2828 Eighteenth Street, Ste. 4A, Benttendorf, Iowa, 52722.

For the City: Mary J. Thee, Human Resource Director, City of Davenport, 226 West Fourth Street, Davenport, Iowa, 52801.

I. BACKGROUND, FACTS, AND STATEMENT OF JURISDICTION

The City of Davenport, Iowa is located on the Mississippi River in eastern Iowa, being one of four cities referred to as the "quad cities." The Davenport Association of Professional Firefighters, Local No. 17 ("Union"), is the certified bargaining representative for Firefighters and Command Officers for the City. This case arises out of a dispute over the salary to be paid the bargaining unit in the parties' one-year successor collective bargaining agreement. The record indicates that the parties have had labor agreements (mostly for one year) for many years.

Unable to conclude a successor collective bargaining agreement, the parties invoked factfinding under the Iowa statute. On January 3, 2002, the undersigned was selected as factfinder in the dispute. A hearing was held at City Hall, Davenport, Iowa, on February 26, 2002. The parties appeared through their representatives and entered exhibits and testimony. The record was closed at the end of the hearing.

II. POSITION OF THE FIREFIGHTERS UNION

The Union's proposal is to increase the salary schedule to reflect a 4.5 percent general wage increase (GWI), effective July 1, 2002.

In support of the above proposal the Union first argues the relevant bench-mark comparative jurisdictions are those Iowa Cities with populations of 50,000 or more. These, with the relevant wage increase for F/Y 2003, include the following cities: Cedar Rapids (4.5%), Council Bluffs (3.5), Des Moines (6.0), Dubuque (5.68), Iowa City (3.25), Sioux City (3.25), and Waterloo (bargaining)(Union Ex. 3.1). In the Union's view, its proposal of 4.5 percent compares more favorably to the external comparables than the City's offer of 2.0% and a 2.0% deferred compensation match (Union Ex. 3.2 & 3.3). Contrary to the Administration's position, the Union contends that Des Moines should be included as a comparable, notwithstanding its size.

The Union further notes that, since 1990, its position relative to that of the Davenport Police Officers has deteriorated significantly. For example, in 1990 the starting salary for a police officer was \$23,451, relatively equal to that of \$23,457 for a Davenport firefighter, a difference of just \$6.00 (Union Ex. 4.1). In 2001, the starting salary for a police officer was \$35,375, while a Davenport firefighter's salary was \$33,693, a difference of \$1,682 in favor of the police (Union Ex. 4.2). The difference is more significant when one moves from starting salaries to the higher ranks (Union Ex. 4.2, 4.3, and 4.4).

Addressing work loads in the jurisdiction, the Union points out that since 1978, there has been an increase of 374 percent in emergency calls (Union Ex. 5.3), and a 329 percent increase in EMS run volume (Union Ex. 5.4). In effect, the firefighters are asked to work more for relatively less pay.

Finally, while acknowledging the City is not entering an inability to pay argument, the Union notes there are avenues available to the City regarding increase funding for the Union's proposal, including assessing fees for EMS runs (Union Ex. 7.4) or adjusting charges for other services (Union Ex. 9).

III. POSITION OF THE ADMINISTRATION

The Administration's offer is a 2.0 percent general wage increase effective 7-1-02, with a 2.0 percent deferred compensation match effective 1-1-03 (City Ex. 1).

The City points out that this is internally comparable with the AFSCME contract (3.0% GWI effective 7-1-02), the Library/AFSCME unit (3.0% GWI), Police (2.0% GWI, 2.0% deferred), and the Teamsters (*Id.*). Given the financial situation of the City, the offer is more than fair and comparable to the external bench marks.

In contrast to the Union, the Administration submits that Des Moines is not a comparable bench-mark city. Citing a March 2, 2001, factfinding report by Arbitrator Stanley Dorby (City Ex. 4), management submits that Des Moines is simply too large a city with too many differences for comparison to Davenport. The Administration also submits that the Dubuque settlement of 5.68% is an aberration and, thus, should not be considered by the factfinder or, if considered, should be discounted.

Finally, the City points out that its offer is the same offer as the parties reached in their tentative agreement of November 13, 2001. In the Administration's view, the tentative agreement should be reflected in the final factfinding report.

IV. DISCUSSION

As I have noted in numerous factfinding opinions generated in this state, the Iowa Code does not outline the criteria upon which a factfinder is to rely in drafting recommendations. However, Section 2.22 (9) (Binding Arbitration) lists the following criteria for *interest arbitrators* to apply:

9. The panel of Arbitrators shall consider, in addition to any other relevant factors, the following factors:
 - a. Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.
 - b. Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.
 - c. The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services.

d. The power of the public employer to levy taxes and appropriate funds for the conduct of its operations

It is acknowledged by all interested parties, as well as the Iowa PERB, that the above criteria should be applied by a factfinder when making a recommendation for a successor collective bargaining agreement. Indeed, in *West Des Moines Education Association v. PERB*, 266 N.W.2d 188 (Iowa, 1978), the Iowa Supreme Court observed that a factfinder is expected to recommend a reasonable offer to the parties:

In our system the Fact Finder is a neutral who would be expected to recommend to the Arbitrator the most reasonable offer. The Arbitrator, mindful of the Fact Finder's neutrality, will offer be prone to choosing the Fact Finder in making his award. This propensity will force the parties to make more reasonable offers because the party who wins over the Fact Finder will enter arbitration with a powerful ally. The party which falls to have the Fact Finder recommend its position will be forced to think long and hard before it continues on to arbitration.

1. **Focus of the interest neutral in formulating recommendations and/or awards**

What should be the focus of the interest neutral when formulating a fact-finding or arbitration award? Should the award reflect the facts or should it reflect the position the parties would have reached had they been permitted to engage in economic warfare? Likewise, where fact-finding is mandated, should the fact-finder issue recommendations that will settle the dispute (i.e., a recommendation that both sides can live with) or, alternatively, should recommendations be drafted based only on the hard facts (assuming, of course, that there are hard facts to be found)?

Where both parties have come to the bargaining and arbitration table with extreme positions, one arbitrator found that the proper focus is to formulate an award based on "a position which both parties would have come to had they been able to reach an agreement themselves."¹

¹ *County of Blue Earth v. Law Enforcement Labor Serv., Inc.*, 90 LA (BNA) 718, 719 (1988) (Rutrick, Arb.); see also 60 *City of Clinton v. Clinton Firefighters Ass'n, Local 9*, 72 LA (BNA) 190 (1979) (Winton, Arb.) (the fact-finder declared "consideration was given to what the parties might have agreed to if negotiations had continued to a conclusion. In the final analysis, however, the Fact Finder must recommend what he considers to be RIGHT in this City at this time. . . ." *Id.* at 196.). In another case, the arbitrator rejected the fact-finder's "recommendations based on compromise in an attempt to gain the parties' support for an intermediate solution." *City of Blaine v. Minnesota Teamsters Union, Local 320*, 70 LA (BNA) 549, 557 (1988) (Perretti, Arb.). In the arbitrator's words, "this is a legitimate strategy for a Fact Finder, but not for an Arbitrator." R. Theodore Clark has argued that the interest arbitrator should not award more than the employees would have been able to obtain if they had the right to strike and management had the right to take a strike. R.T. Clark, Jr., *Interest Arbitration: Can*

the Public Sector Afford It? Developing Limitations on the Process: II. A Management Perspective, in *Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators* (J.L. Stern & B.D. Dennis, eds) 248, 256 (BNA Books, 1982). Clark referenced another commentator's suggestion that interest neutrals "must be able to suggest or order settlements of wage issues that would conform in some measure to what the situation would be had the parties been allowed the right to strike and the right to take the strike." *Id.* See also *Des Moines Transit Co. v. Amalgamated Ass'n of Am., Div.*, 441, 38 LA (BNA) 666 (1962) (Flagler, Arb.) "It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to *either party* that which they could not have secured at the bargaining table." *Id.* at 671.

Arbitrators and advocates are unsure whether the object of the entire process is simply to achieve a decision rather than a strike, as is sometimes the case in grievance arbitration, or whether interest arbitration is really like mediation-arbitration, where, as noted by one practitioner, "what you do is to identify the range of expectations so that you will come up with a settlement that both sides can live with and where neither side is shocked at the result." See, Berkowitz, *Arbitration of Public-Sector Interest Disputes: Economics, Politics and Equity: Discussion*, in *Arbitration-1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators (B.D. Dennis & G.C. Somers, eds) 159, 186 (BNA Books, 1976).

While I do not advocate that interest neutrals issue decisions that surprise both parties (i.e., decisions outside the "range of expectations" or "outliers"), there is something to be said for attempting to determine whether the parties would have found themselves with the strike weapon at their disposal. At times this would favor a large union and at other times the employer. The job of an interest neutral, however, is not to equalize bargaining power, or to do "what is right" but, rather, to render an award applying the statutory criteria. At the same time, if the process is to work, "it must not yield substantially different results than could be obtained by the parties through bargaining." *Arizona Pub. Serv. Co. v. Int'l Bhd. of Elec. Workers, Local 387*, 63 LA 1189, 1196 (1974) (Platt, Arb.). In this regard Arbitrator Harvey Nathan, in a 1988 arbitration under the Illinois statute, outlined the better view of an arbitrator's function as follows:

[I]nterest arbitration is essentially a conservative process. While, obviously, value judgments are inherent, the neutral cannot impose upon the parties contractual procedures he or she knows the parties themselves would never agree to. Nor is it the function to embark upon new ground and create some innovative procedural or benefit scheme which is unrelated to [the] parties' particular bargaining history. The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining.

Will County Bd. and Sheriff of Will County v. AFSCME Council 31, Local 2961, Illinois State Labor Relations Board, (Nathan, Chair., Aug. 17, 1988) (unpublished). See generally, Hill, Sinicropi and Evenson, Winning Arbitration Advocacy (BNA Books, 1998)(Chapter 9)(discussing the focus of the interest neutral).

I believe the same analysis should be applied by a factfinder under the Iowa statutory scheme. An interest proceeding is part of the bargaining process.

2. Relevance of Internal vs. External Comparisons

Both parties have advanced arguments with respect to internal and external criteria. How significant is internal and external comparability as criteria in interest proceedings? More important for this dispute, should the city of Des Moines be included in the relevant comparative benchmarks?

In *Elk Grove Village & Metropolitan Alliance of Police (MAP)* (Goldstein, 1996), Illinois Arbitrator Elliott Goldstein noted that “the factor of internal comparability alone required selection of the Village’s insurance proposal.” Arbitrator Goldstein stressed that arbitrators have “uniformly recognized the need for uniformity in the administration of health insurance benefits.” Similarly, in *Will County, Will County Sheriff & AFSCME Council 31* (Fleischli, 1996)(unpublished), Arbitrator George Fleischli observed that when an employer has established and maintained a consistent practice with regard to certain fringe benefits, such a health insurance, it “takes very compelling evidence” in the form of external comparisons to justify a deviation from that past practice. Other considerations equal, I agree with those arbitrators who find internal comparability equally or more compelling than external data.

Applying the better weight of arbitral authority, the City makes the better argument when internal data is considered. I find it significant that its offer to the firefighters is the same as the settlement for the police and teamsters unit, 2.0% GWI effective 7-1-02, and a 2% deferred package effective 1-1-03 (City Ex. 1). Also, with respect to external data, the average increase is 3.73% (excluding Des Moines), which clearly puts both offers in the ballpark, management more so than the Union’s position (City Ex. 2).

Contrary to the City’s position, however, I find Des Moines to be a relevant bench-mark jurisdiction for this reason: Apparently since at least 1978 the parties themselves have considered Des Moines a relevant comparative city. In this respect the Sinicropi award of 1978 (Union Ex. 10) is telling. Moreover, as late as 2000-2001 the City’s own exhibits listed Des Moines as a relevant city (Union Ex. 10). While the experience in one city, such as Des Moines, is not dispositive of a factfinding or arbitration result in Davenport, I see no reason to suddenly disregard Des Moines as a comparable, especially in light of the parties’ long-term bargaining history. The Union makes the better case on the comparables.

C. The effect of the parties’ tentative agreement

The City argues that the tentative agreement of the parties should be accorded significant if not dispositive weight in formulating recommendations in the present case. The Union takes the opposite position. In the cases of *Waterloo and Illinois FOP Labor Council, ISLRB, S-MA-97-198* (Perkovich, November 1999); *Oak Brook and Teamsters Local 714, ISLRB, S-MA-96-73* (Benn, August 1996); and *Peru and Illinois FOP Labor Council, ISLRB S-MA-93-153* (Berman, March 1995), the arbitrators did not completely discount the importance of tentative agreements, in the Union’s view.

In the *Peru* decision, Arbitrator Herb Berman did not find that the facts of the dispute warranted ascribing importance to the tentative agreement, but nonetheless held that “[a] tentative

agreement may be considered, but it is not dispositive. The weight to be given a tentative agreement necessarily varies with circumstances, but it does not have the same weight as the facts set out in Section 14(g)." *Id.* at 18. In the *Oak Brook* decision Arbitrator Edwin Benn properly accorded a rejected TA weight. The fact that the tentative agreement was not ratified by the union merely mitigated against the employer's burden of proof. In Arbitrator Benn's view: "the parties' well-framed arguments which are supported by authority serve to negate each other – the Village argues that the Union's bargaining team agreed; the Union argues that the Village must demonstrate why a change in the *status quo* is required." *Id.* at 5. Finally, Arbitrator Perkovich did not reject the importance of tentative agreements in the *Waterloo* decision. He simply remarked that the TA was not relevant in that case, because "there is no evidence in this record that the Union acted for this purpose [to seek more than it agreed to] or in some other fashion indicative of bad faith." *Id.* at 3.

Arbitrator Peter Meyers, in *County of Sangamon*, S-MA-97-54 at 6-7 (February 12, 1999) recognized the inherent paradox that would be created if one relied on a tentative agreement as evidence of the hypothetical agreement that the parties would have reached if left to their own devices:

Tentative agreements reached during the course of collective bargaining sessions are just what their name suggests, tentative. A tentative agreement on an issue has been reached by the parties' bargaining representatives does not represent the final step in the collective bargaining process; such an agreement instead is more of an intermediate step. For a tentative agreement to acquire any binding contractual effect, it generally must be presented to the parties themselves, ratified, and ultimately executed before it may be imposed as binding upon the parties' relationship.

Arbitrator Meyers went on to assert that tentative agreements cannot be given weight in a subsequent proceeding:

... [T]he tentative agreements cannot be given great weight, or even any weight at all, because they do not necessarily represent what the parties would have agreed to if they had successfully negotiated a complete collective bargaining agreement. The so-called "busted TA's" therefore will not be considered in the resolution of the impasse issues presented in the proceeding.

Arbitrator Meyers' blanket position does not reflect what I believe to be the better weight of arbitral authority. In *Village of Schaumburg and Schaumburg FOP Lodge No. 71*, S-MA-93-155 (Fleischli, September 1994), Arbitrator George Fleischli held that in certain circumstances tentative agreements may be relevant in assessing the reasonableness of a party's offer. In this context, the inquiry focuses on what the surrounding facts tell about the reasons for a party's rejection of a TA. His words are instructive in this proceeding:

It would be clearly inappropriate, under the law, to treat the terms of the tentative agreement as controlling. As the Union points out, both parties understood that the terms of

that agreement were tentative in the sense that it was subject to ratification by both parties. However, the Village does not argue that the terms of the tentative agreement should be treated as controlling herein. Instead, it argues that they should be given great weight.

* * *

In dealing with this aspect of the dispute, a balance must be struck. On the one hand, it is important that the authority of the parties' collective bargaining team not be unnecessarily undermined. Specifically, in the case of the Union, its bargaining team ought not to be discouraged from exercising leadership. Some risk taking must occur on both sides, if voluntary collective bargaining is to work and arbitration avoided, where possible. Clearly, the Union's membership had the legal right to reject the proposed settlement. However, the Union's membership (and the Village board) must understand that, while it is easy to second guess their bargaining teams, whenever a tentative agreement is rejected, it undermines their authority and ability to achieve voluntary settlements.

On the other hand, serious consideration should be given to the stated or apparent reasons for either party's rejection of a tentative agreement. **If, for example the evidence were to show that there was a significant misunderstanding as to the terms or implications of the settlement, those terms ought not to be considered persuasive. Under those circumstances, there would be, in effect, no tentative agreement. However, if the terms are rejected simply because of a belief that it might have been possible to "do a little better," the terms of the tentative agreement should be viewed as a valid indication of what the parties' own representatives viewed as a valid indication of what the parties' own representatives considered to be reasonable and given some weight in the deliberations.**

Id. at 33-34 (emphasis supplied). Arbitrator Fleischli subscribed to the view that interest arbitration is merely a continuation of the bargaining process, and, therefore, that "the function of the arbitrator should be to try and approximate the agreement the parties would have or should have reached themselves, knowing that either party could force the impasse into an interest arbitration proceeding." *Id.* at 34.

I am convinced that Arbitrator Fleischli makes the better argument regarding the weight to be accorded tentative agreements. Like Mr. Fleischli, I am on record as concluding that an interest Arbitrator should strive to award a position the parties would have reached if both parties were left to their own devices, including, but not limited to, a strike. See, Marvin Hill and Emily Delacenserie, *Interest Arbitration Criteria in Fact-Finding & Arbitration, Evidentiary & Substantive Consideration*, 74 MARQ. L. REV. 399 (1991). **A tentative agreement indicates what the parties, or their duly-appointed representatives, thought was a result otherwise conducive to their interests. They are the insiders and presumptively know the environment and numbers better than any neutral. While certainly not dispositive (nor "res judicata") of a specified result in an interest arbitration, a party would be hard-pressed to argue that a tentative agreement**

should be ignored by an arbitrator. It is from this perspective, as outlined by Arbitrator Fleischli above, that the parties' factfinding positions and offers are analyzed. In summary, I find no reason not to accord the tentative agreement "serious" weight.

D. The parity experience of the Davenport Firefighters relative to the Police Officers

Working in the Union's favor in this case an examination of the parties' wage relationship between police and firefighters. The Union has advanced a valid argument that, during the past 25 years, salaries of firefighters have lagged relative to police officers. The data supports the Union's argument (see, Union Ex. 4.4). The Administration has offered no valid reason explaining why the fire unit was allowed to lag behind the police officers, and I cannot conclude that the job of firefighter is any less important or less dangerous than that of police officer, especially in this day and age. Moreover, to grant both units the same percent increase will not solve the problem. Starting from a higher base, the firefighters' situation will continue to deteriorate.

At the same time, and favoring the Administration's case, arbitrators and factfinders may have no special duty to correct previous job inequities between police and fire units within a city. This is because the parties themselves presumptively had control over salaries and benefits previously negotiated, at least in those cases where salary structures remain outside the mandate of arbitrators' interest awards. Arbitrator Elliott Goldstein outlined this principle in *City of DeKalb v. DeKalb Professional Firefighters Ass'n, Local No. 1236*, Arb No. 87/127, Illinois Labor Relations Board (Goldstein, Chair. 1988)(unpublished):

It is not the responsibility of the arbitration panel to correct previously negotiated wage inequities, if any. The concern of the panel and its authority to evaluate comparisons is limited to the current agreement. This is because the parties themselves had control over salaries and benefits previously negotiated. They alone decide whether the "disparity" in either base pay or overall compensation between the FOP and IAFF was a pertinent consideration in their deliberations; and if so, whether the agreed-upon salaries and overall compensation would meet, exceed or fall below either FOP or the AFSCME unit. The chair must presume that in the past the parties reached agreement in good faith and considered all the factors they believed pertinent.

However, another interest neutral found parity a major consideration, especially where relationships were long term: "Wage parity among Metropolitan Dade County employees is a historical fact." See, *Metropolitan Dade County v. AFSCME Council 79, Local 121*, Dec. No. SM-89-019 (Levine, Arb. 1988)(unpublished).

Notwithstanding parity considerations, operating against a 4.5 general wage increase for the bargaining unit is the financial situation of the City. The Union's expert witness, Wayne Newkirk, Ph.D., testified that while the City's general fund is in balance for FY 02, the employer nevertheless

anticipates deficits of between \$460,000 and \$1.7 million for outlying years (Union Ex. 9). To this end the Union's witness acknowledged:

The City's operating budgets for FY 03 and FY 04 will be impinged by anticipated increases in personal insurance expenses and the impact of tax levy caps which limit the amount of revenue which would otherwise be generated by residential property. The continuing imbalance between tax revenues (approximately 2%) and personnel costs (approximately 4.5%) in retrospect is not a suprising development and the City should endeavor to address the imbalance by exploring alternative avenues of financing personnel expenses. (Union Ex. 9; footnotes omitted).

Given the entire evidence record, and specifically the police-firefighter parity disparity (which I view as important to a settlement), and applying the statutory criteria, I recommend that the one-year successor collective bargaining agreement contain a 3.25 percent general wage increase, effective July 1, 2002, and a 2.0 percent deferred compensation match, effective 1-1-03. This is consistent with both the internal and external comparables and, more important, justifiable when the following historical data is examined for the Davenport bargaining unit:

<u>Time Frame</u>	<u>Salary Adjustments</u>
7/1/96-6/30/97	3.70%
7/1/97-6/30/98	3.0%
7/1/98-6/30/99	3.10%
7/1/99-6/30/00	3.50%
7/1/00-6/30/01	3.25%

Average percentage increase from 7/1/96-6/30/97: 3.31 (Union Ex. 9 at I-A-1)

For the above reasons, the following recommendation is entered:

V. FACTFINDING RECOMMENDATION

The one-year successor collective bargaining agreement contain a 3.25 percent general wage increase, effective July 1, 2002, and a 2.0 percent deferred compensation match, effective 1-1-03.

Dated this 4th day of March, 2002,
at DeKalb, Illinois.

Marvin F. Hill, Jr.,
Arbitrator